United States Department of Labor
Employees' Compensation Appeals Board

KARON A. FLEMING, Appellant	)	
and	)	**Docket No. 04-1410**
	)	**Issued: October 27, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Bayville, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On May 3, 2004 appellant, through her attorney, filed a timely appeal of a December 16, 2003 merit decision of the hearing representative of the Office of Workers' Compensation Programs affirming a finding that appellant was entitled to a schedule award for a 15 percent permanent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 15 percent permanent impairment of the left upper extremity. On appeal, appellant contends that a conflict in medical opinion exists between her physician and the Office medical adviser on the extent of her permanent impairment.

FACTUAL HISTORY

On October 16, 1999 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim for her left arm occurring that date in the performance of duty. The Office accepted

appellant's claim for a left rotator cuff tear. She stopped work on October 16, 1999 and returned to work on October 25, 1999.

A magnetic resonance imaging (MRI) study of appellant's left shoulder obtained on December 18, 1999 revealed a possible bone tumor and a "probable pathologic tear of the rotator cuff." On March 28, 2000 Dr. Joseph Benevenia, a Board-certified orthopedic surgeon, performed a repair of a torn rotator cuff, a curettage and allografting of the right greater tuberosity lesion and an incision of bone and opening of the cortex.[1]

The Office paid appellant compensation for temporary total disability from March 28 through September 18, 2000. She returned to limited-duty employment on September 19, 2000.

In a report dated May 22, 2000, Dr. Benevenia recommended physical therapy for appellant's left rotator cuff repair.

On May 26, 2001 appellant filed a claim for a schedule award. In support of her request, she submitted an impairment evaluation dated April 20, 2001 from Dr. David Weiss, an osteopath. On physical examination, Dr. Weiss stated, "Range of motion reveals forward elevation of 150/180 degrees, abduction of 120/180 degrees, cross-over adduction of 65/75 degrees and external rotation of 90/90 degrees." He found that appellant was status post a repair of a left rotator cuff tear, an incision and drainage of a cystic lesion of the left greater tuberosity and a post-traumatic acromioclavicular arthropathy with impingement of the left shoulder. Dr. Weiss discussed appellant's complaints of intermittent "left shoulder pain and stiffness" and listed findings of decreased muscle strength. He found that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001), appellant had a 24 percent impairment due to her left shoulder arthroplasty,[2] a 2 percent impairment due to decreased shoulder flexion[3] and a 3 percent impairment resulting from decreased shoulder abduction.[4] Dr. Weiss combined the arthroplasty and range of motion impairment findings and concluded that appellant had a total impairment of the left upper extremity of 28 percent. He further opined that she reached maximum medical improvement on April 12, 2001.

An Office medical adviser reviewed Dr. Weiss' report on March 5, 2002. He concurred with Dr. Weiss' findings that 150 degrees of forward elevation constituted a 2 percent impairment,[5] that 120 degrees of abduction constituted a 3 percent impairment[6] and that 65

[1] Dr. Benevenia stated that he was performing surgery on appellant's right rather than left arm; however, this appears to be a typographical error. A tumor biopsy performed on May 28, 2000 identified the specimen as from the left humerus.

[2] A.M.A., *Guides* 506, Table 16-27.

[3] *Id*. at 476, Figure 16-40.

[4] *Id*. at 477, Figure 16-43.

[5] *Id*. at 476, Figure 16-40.

[6] *Id*. at 477, Figure 16-43.

degrees of adduction constituted no impairment under the A.M.A., *Guides*.[7] *T*he Office medical adviser further agreed that appellant reached maximum medical improvement on April 12, 2001. He noted that appellant had no impairment due to loss of muscle strength as the A.M.A., *Guides* prohibited combining loss of muscle strength with other objective factors of impairment such as loss of range of motion.[8] The Office medical adviser further determined that appellant had a 10 percent impairment due to arthroplasty.[9] He stated, "Dr. Weiss used a total shoulder arthroplasty with an implant (24 percent). This is incorrect. A rotator cuff repair was done -- 10 percent is the most that can be allowed [and] is a generous am[ount]." He concluded that appellant had a 15 percent permanent impairment of the left upper extremity.

By decision dated January 21, 2003, the Office granted appellant a schedule award for a 15 percent permanent impairment of the left upper extremity. The period of the award ran for 46.80 weeks from April 12, 2001 to March 5, 2002.

On January 30, 2003 appellant, through her representative, requested a hearing. At the hearing held on August 29, 2003, appellant's representative contended that a conflict existed between Dr. Weiss and the Office medical adviser regarding the type of surgery performed. He noted that appellant's surgery involved a cystic lesion and repairing damage in the cortex in addition to the rotator cuff repair. The hearing representative requested a report from Dr. Weiss addressing why he believed appellant should receive a higher impairment rating than that found by the Office medical adviser due to the extent of the surgery. Appellant did not submit a supplemental report from Dr. Weiss following the hearing.

By decision dated December 16, 2003, the hearing representative affirmed the Office's January 21, 2003 decision. She concluded that the Office medical adviser's report constituted the weight of the medical evidence as it provided "a more accurate assessment of the impairment" and was consistent with the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[10] and its implementing regulation,[11] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all

[7] *Id*.

[8] *Id*. at 508.

[9] *Id*. at 506, Table 16-27.

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

claimants.[12] The Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[13]

Section 16.7b, of the fifth edition of the A.M.A., *Guides*, "Arthroplasty," provides, "In the presence of *decreased motion*, motion impairments are derived separately (Section 16.4) and *combined* with the arthroplasty impairment. (Combined Values Chart, p. 604)."[14] (Emphasis in the original.)

ANALYSIS

In a report dated April 20, 2001, Dr. Weiss listed range of motion measurements for the left shoulder of 180 degrees forward elevation, which is a 2 percent impairment,[15] 120 degrees of adduction, which is no impairment,[16] 65 degrees abduction, which is a 3 percent impairment[17] and 90 degrees external rotation, which is no impairment.[18] He then determined that appellant had a 24 percent impairment due to left shoulder arthroplasty, which is the impairment provided for a total shoulder implant arthroplasty according to Table 16-27 on page 506 of the A.M.A., *Guides*. Dr. Weiss combined the impairment due to loss of motion with the impairment due to arthroplasty and found a total left upper extremity impairment of 28 percent.[19]

The Office medical adviser reviewed Dr. Weiss' report and concurred with his finding that appellant had a 5 percent impairment due to loss of shoulder flexion and abduction. He found, however, that appellant was entitled to no more than a 10 percent impairment under Table 16-27 on page 506 of the A.M.A., *Guides*, which is the amount provided for an isolated resection arthroplasty of the distal clavical. He did not, however, explain the effect of the other aspects of appellant's surgery on the impairment rating. The Office medical combined the impairment due to arthroplasty with the impairment due to loss of range of motion and concluded that appellant had a 15 percent left upper extremity impairment.

A conflict in opinion thus exists between appellant's physician, Dr. Weiss, and the Office referral physician over the extent of appellant's impairment due to athroplasty pursuant to Table 16-27 on page 506 of the A.M.A., *Guides*. The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the

[12] 20 C.F.R. § 10.404(a).

[13] *See* FECA Bulletin No. 01-05 (issued January 20, 2001).

[14] A.M.A., *Guides* at 505.

[15] A.M.A., *Guides* 476, Figure 16-40.

[16] *Id*. at 477, Figure 16-43.

[17] *Id*.

[18] *Id*. at 479, Figure 16-46.

[19] As noted above, an impairment of the upper extremity due to decreased motion may be combined with an impairment due to arthroplasty. A.M.A., *Guides* at 505.

Office shall appoint a third physician who shall make an examination.[20] The case will be remanded to the Office for further development, including the referral of appellant to an impartial medical examiner to determine the extent of her permanent impairment due to her employment injury. After such further development of the record as is deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision. A conflict exists on the issue of the extent of appellant's permanent impairment of the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2003 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[20] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).